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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF ARIZONA**

9 BMO Harris Bank, N.A.,
10
11 Plaintiff,

12 v.

13 Marty R. Guthmiller and Denise M.
14 Guthmiller, husband and wife,
15
16 Defendants.

No. CV 13-00298-PHX-MEA

**PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

(Assigned to the Hon. Mark A. Aspey)

15 Pursuant to A.R.S. § 33-814(A), a debtor is entitled to a fair market value hearing
16 where the lender partially satisfies the debt at issue through a trustee's sale. BMO
17 Harris Bank, N.A. has never held a sale concerning the deed of trust at issue here. So
18 the Guthmillers are not entitled to a fair market value hearing. The Court should grant
19 summary judgment so holding, and enter judgment in BMO's favor on its breach of
20 contract claim.

21 **MEMORANDUM OF POINTS AND AUTHORITIES**

22 **I. Facts.**

23 This case concerns BMO's efforts to enforce the Guthmillers' liability on a home
24 equity line of credit (the "HELOC"). The Guthmillers obtained the HELOC, which was
25 secured by a second-position deed of trust on their residence.¹ BMO also had a first-
26 position deed of trust on the residence for an unrelated loan.² After the Guthmillers

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28 ¹ BMO Statement of Fact ("SOF") 1.
² SOF 2.

1 defaulted on the first-position loan, BMO conducted a trustee's sale on its first-position
2 deed of trust.³ The proceeds of the sale were insufficient to satisfy even the first-
3 position loan, and it left the second-position deed of trust unsecured.⁴ Then, BMO filed
4 this suit to enforce the HELOC that had previously been secured by the second-position
5 deed of trust.

6 **II. The parties have narrowed the issues such that the applicability of A.R.S. §**
7 **33-814(A) is potentially the sole remaining issue.**

8 The parties previously engaged in discussions to narrow the issues for the Court.
9 As a result, the Guthmillers are not contesting their liability on their contracts with
10 BMO.⁵ And they have since abandoned their claim that A.R.S. § 33-814(G) applies.
11 But they still contest whether they are entitled to a fair market value hearing under
12 A.R.S. § 33-814, and the credit to be applied if so. This motion will only address
13 whether A.R.S. § 33-814(A) applies in the first instance. If it does not apply, the
14 Guthmillers do not have a right to a fair market value hearing, and then judgment in
15 BMO's favor on the full amount sought in its complaint is appropriate. If it does, the
16 Court has outlined a procedure for the resolution of the credit to be applied.⁶

17 **III. The text of A.R.S. § 33-814 shows that the right to a fair market value**
18 **hearing is only triggered by a sale concerning the obligation at issue.**

19 Section 33-814(A) provides for a fair market value hearing, while Section 33-
20 814(B) clarifies when the right to that hearing applies. Under Section 33-814(B), a
21 debtor only has a right to a fair market value hearing when "a sale is pursuant to one of
22 two or more trust deeds securing the *same obligation . . .*" (Emphasis added.) That is
23 not the case here, so Section 33-814 does not apply. And it is why the Court's analysis
24 should end here.

25 The remaining portion of Section 33-814(B) confirms this reading. Section 33-

26 ³ SOF 3.

27 ⁴ SOF 4.

28 ⁵ Stipulation, Doc. 29.

⁶ Order, Doc. 31.

1 814(B) further provides that the period to request a trustee's sale is triggered "on . . . the
2 date of sale under the last trust deed securing the obligation" That period can
3 never be triggered here, because there can never be a trustee's sale on the now-
4 unsecured second-position deed of trust. So reading the statute as the Guthmillers do
5 would create the absurd result that Section 33-814(A) and (B) provide a 90-day period
6 to request a fair market value hearing that could never be triggered in the circumstances
7 here – where a trustee's sale on a first-position deed leaves the second-position deed
8 unsecured.

9 And Section 33-814(A) itself further confirms what Section 33-814(B) says. In
10 fact, Section 33-814(A) makes no sense if it applies to a deed of trust that has not been
11 foreclosed. First, as in Section 33-814(B), the triggering event to Section 33-814(A)'s
12 application is the "sale of trust property under a trust deed" and, once triggered, it
13 permits an action "against any person . . . liable on the contract for which the deed of
14 trust was given as security" But here the triggering "sale of trust property" was for
15 the first-position loan, not the HELOC at issue. So by the text of the statute, there is no
16 right to a fair market value hearing on the second-position deed.

17 **IV. Conclusion.**

18 The Guthmillers cannot re-write Section 33-814 to create a new right to a fair
19 market value hearing. The version of that statute that exists shows no such right exists
20 here, because there has been no triggering sale on the HELOC. The Court should grant
21 BMO summary judgment, awarding it the \$120,891.44 currently due on the contract,
22 plus its attorneys' fees and litigation expenses pursuant to the parties contracts and
23 A.R.S. § 12-341.01.⁷

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28 ⁷ SOF 4-6.

1 RESPECTFULLY SUBMITTED this 23rd day of August, 2013.

2 **STINSON MORRISON HECKER LLP**

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10 **CERTIFICATE OF SERVICE**

11 I hereby certify that on August 23, 2013, I caused the foregoing document to be
12 filed electronically with the Clerk of Court through ECF; and that ECF will send an e-
13 notice of the electronic filing to:

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